LAW REFORM
COMMISSION
OF
NOVA SCOTIA

Grandparent-Grandchild: Access

Final Report - April 2007

2008-01502/

LAW REFORM
COMMISSION
OF
NOVA SCOTIA

FINAL REPORT

Grandparent-Grandchild: Access

Law Reform Commission of Nova Scotia
April 2007

The Law Reform Commission of Nova Scotia was established in 1991 by the Government of Nova Scotia under an *Act to Establish an Independent Law Reform Commission.*

The Commissioners are:

Anthony Chapman, Q.C., President
Thomas A. Cromwell
Diana E. Ginn
Darlene A. Jamieson, Q.C.
John L. McMullan
E. Arleen Paris

John E.S. Briggs
Executive Director and General Counsel

William H. Laurence
Legal Research Counsel

Krista Tinslay
Administrative Assistant

The Law Reform Commission offices are located at:

2nd Floor, 1484 Carlton Street
Halifax, Nova Scotia B3H 3B7

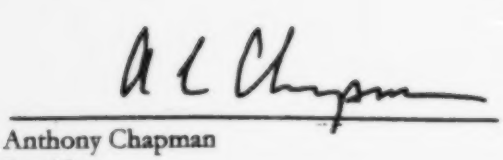
Telephone:(902) 423-2633
Fax:(902) 423-0222
Email:info@lawreform.ns.ca
Web Site:www.lawreform.ns.ca

The Law Reform Commission receives funding from the Law Foundation of Nova Scotia, and from the Government of Nova Scotia.
The Commission gratefully acknowledges this financial support.

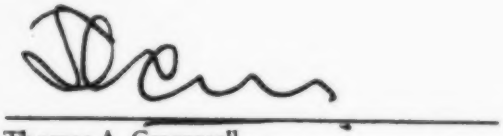
Law Reform Commission of Nova Scotia

To: The Honourable Murray K. Scott
Minister of Justice and Attorney General

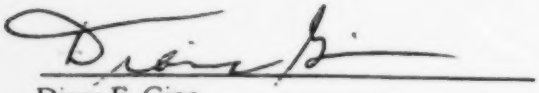
In accordance with section 12(3) of the *Law Reform Commission Act*, we are pleased to present the Commission's Final Report, ***Grandparent-Grandchild: Access***.



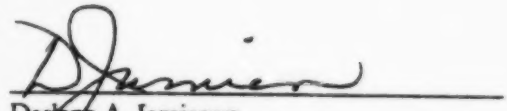
Anthony Chapman
President



Thomas A. Cromwell
Commissioner

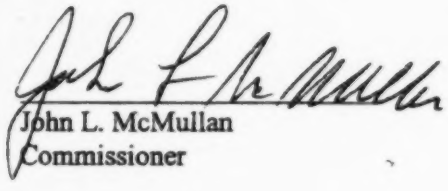


Diana E. Ginn
Commissioner



Darlene A. Jamieson
Commissioner

E. Arleen Paris
Commissioner



John L. McMullan
Commissioner

SUMMARY

Family law issues, particularly as they relate to custody of, and access to, children, are especially difficult ones. This is no less so than when dealing with the issue of access by grandparents to their grandchildren. Fortunately, in most cases, child custody and access arrangements, including access by grandparents and others, are settled without recourse to litigation and the courts. The cases that do come before the courts, therefore, represent a very small percentage of the overall number of potential family law disputes.

Historically, grandparents had no automatic right of access to their grandchildren simply by virtue of their biological relationship. Legislation in all Canadian jurisdictions now makes it possible for grandparents to apply for custody of, or access to, their grandchildren. There is no jurisdiction in Canada, however, which provides to grandparents access as of right, which is usually referred to as an automatic or presumptive right of access.

It is incorrect to suggest that grandparents in Nova Scotia have no means to seek access to their grandchildren, in the event of a dispute over access with a custodial parent or guardian. Like other persons interested in a child's well-being, grandparents are entitled to seek the assistance of the courts to obtain access. What grandparents in Nova Scotia do not possess is an automatic right of access, enforceable regardless of the wishes of a custodial parent, guardian, or grandchild.

In Nova Scotia, section 18(2) of the *Maintenance and Custody Act* provides that a parent or guardian or "other person with leave of the court" may apply for custody of, or access to, a child. Although there is no explicit reference to grandparents, this provision has been used by them to obtain access to their grandchildren. In Nova Scotia, an applicant must therefore first obtain the leave or permission of the court in order to bring an application. Such leave, although sometimes denied, has been granted by the Nova Scotia courts in appropriate circumstances.

Legislative provisions in all jurisdictions in Canada also mandate that courts, when deciding upon an access application, must do so on the basis of the child's "best interests." These interests are to be paramount in reaching any decision. The "best interests of the child" standard requires each case to be assessed on the basis of its own merits, as determined by careful consideration of the particular facts presented by the case.

The Commission is of the view that existing Nova Scotian legislation, when seen through the lens of the best interests of the child, currently strikes the right balance. As a result, the Commission is not in favour of creating an automatic right of access on the part of grandparents or other relatives.

Having said this, the Commission does see opportunity for reform in the area of grandparent-grandchild access.

The Law Reform Commission of Nova Scotia recommends that:

1) In order to help guide judges, parents, grandparents and other interested persons, the *Maintenance and Custody Act* be amended to provide a "best interests of the child" list of factors to consider, similar to the provisions in the *Children and Family Services Act*.

2) Section 18(2) of the *Maintenance and Custody Act* be amended to provide that an application for access may be made by a parent or a guardian or *"other person, including grandparents or other members of the child's family, with leave of the court."*

3) The leave provision in section 18(2) of the *Maintenance and Custody Act* be retained.

Table of Contents

I) ORIGINS OF PROJECT 1

II) INTRODUCTION 1
- 1) Parliamentary Interest in this Issue 1
- 2) "Grandparents Rights for Nova Scotia" 4

III) THE LEGAL LANDSCAPE 7
- 1) Federal Legislation 8
- 2) Provincial and Territorial Legislation 8
  - a) Nova Scotia 8
  - b) Newfoundland 9
  - c) New Brunswick 9
  - d) Quebec 9
  - e) Alberta 9
  - f) British Columbia 10
  - g) Yukon 10
  - h) Manitoba 10
- 3) How the Courts Have Responded 11
  - a) Two Main Approaches 11
  - b) Canadian Case Law 12
    - i) Ontario 12
    - ii) Nova Scotia 14
    - iii) Alberta 16
    - iv) British Columbia 16
    - v) Quebec 17
  - c) American Case Law 19

IV) DISCUSSION OF ISSUES 21

V) RECOMMENDATIONS FOR REFORM 26

APPENDIX "A" Bill C-22 - Proposed Amendments to the Divorce Act 33

APPENDIX "B" Members of the Advisory Group 36

APPENDIX "C" List of Individuals and Organizations that Provided Comments 38

I) ORIGINS OF PROJECT

In January 2006, the Law Reform Commission of Nova Scotia received a written request from the Department of Justice *"to consider undertaking a project focused on grandparents' rights in Nova Scotia and any recommendations for reform"*.[1] The Commission met shortly thereafter and agreed to undertake this project.

It was decided that the focus of this report and the project giving rise to it would be the discrete issue of grandparents' rights of access.

II) INTRODUCTION

The issue of grandparents' rights of access to grandchildren is not new. Some 20 years ago, the Canadian Grandparents Rights Association, British Columbia Branch, was formed. Similar branches have since been formed in other provinces, including Nova Scotia.

1) Parliamentary Interest in this Issue

The issue of grandparents and access has been formally addressed by a parliamentary Special Joint Committee. In December 1998, the Senate - House of Commons Special Joint Committee on Child Custody and Access submitted its report entitled, *For the Sake of the Children.* [2]

The Committee held extensive public hearings throughout the year and heard from more than 500 witnesses across Canada. The Committee's terms of reference included the following objectives:

> *To examine and analyze issues relating to custody and access arrangements after separation and divorce, and in particular, to assess the need for a more child-centered approach to family law policies and practices that would emphasize joint parental responsibilities and child-focused parenting arrangements based on children's needs and best interests.* [3]

---

1 Letter, Douglas J. Keefe (Nova Scotia Department of Justice) to John E.S. Briggs (Law Reform Commission of Nova Scotia), 10 January 2006.

2 *For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access* ([Ottawa]: The Committee, 1998), at 1.

3 *Ibid.* at 1.

The Special Joint Committee noted that those who were not satisfied with the divorce process would be the ones most motivated and likely to appear before the Committee. They were aware that the testimony of such persons would not therefore represent the full range of views of divorced parents. The Committee concluded: "*As a result, members were cautious about solutions based on exceptional cases or worst-case scenarios.*" [4]

Under the heading "Reducing Conflict" the Committee noted that:

> *. . the principle objective underlying all the recommendations in this report is to induce as thorough as possible a shift from the current state of family law policies and practices, which all too often escalate conflict between divorcing parents, to a decision-making approach that reduces conflict.* [5]

The Committee went on to note that:

> *Psychologists, psychiatrists and social workers across the country testified that many of the children they see in their clinics are damaged by conflict that continues after divorce.*
>
> . . . . .
>
> *Several legal and mental health professionals gave testimony that supported the children's view of divorce. All agreed that high conflict situations are dangerous for children.* [6]

Under the heading "Widening the Circle: Involving Others With the Children of Divorce", the Committee reported amongst other things as follows:

> *Grandparents from across Canada testified before the committee and asked that their relationship with their grandchildren be respected in law after parents divorce. The committee heard many painful examples of how divorce had severed a caring and loving relationship between grandparents and grandchildren. These witnesses also pointed out that grandparents often provide a child's continuing involvement with his or her heritage and that this should be honoured in law.* [7]

Subsequently in the report, under the heading "Grandparents' Applications for Parenting Orders", the Committee stated:

---

4 *Ibid.* at 2.

5 *Ibid.* at 24.

6 *Ibid.* at 24-25.

7 *Ibid.* at 34.

> *The Committee found the testimony of grandparents and their representatives extremely compelling. The Committee also heard moving testimony, however, about the importance of siblings, step-siblings and other extended family members in the lives of children. Other important people in the life of a child might well be family members or friends, and many Members of the Committee felt there should be no legislative presumption that grandparents have a different standing in parenting applications relative to those other important people.*
>
> *The Committee decided to recommend that the concerns of grandparents be addressed in two ways. First, the importance of grandparent-grandchild relationships should be included in the list of statutory criteria that will guide those making shared parenting determinations under the "best interests of the child" test . . . . Second, the importance of relationships with grandparents and other extended family members must be considered and provided for in the development of parenting plans.*[8]

The Committee went on to observe that action by the provincial and territorial governments would be required in order to provide further solutions to the problems raised by grandparents. In this regard, the Committee stated:

> *Members commend to the other provinces the wording of Article 611 of the Civil Code of Quebec, which provides that in no case shall a parent, without a grave reason, interfere with personal relations between a child and his or her grandparents.* [9]

The Committee formulated its recommendation (number 21) as follows:

> *This Committee recommends that the provincial and territorial governments consider amending their family law to provide that maintaining and fostering relationships with grandparents and other extended family members is in the best interests of children, and that such relationships should not be disrupted without a significant reason related to the well being of the child.* [10]

---

8 *Ibid.* at 56.

9 *Ibid.* at 57.

10 *Ibid.*

2) "Grandparents Rights for Nova Scotia"

The Grandparents Rights for Nova Scotia Association *"exists to promote, support, and assist grandparents and their families in either maintaining or reestablishing family ties and stability, especially those ties between grandparents and grandchildren, in situations where the family has been disrupted by situations such as parental divorce."*[11]

The Association includes amongst its "*Priorities for Action*" the following:

- To move swiftly to ensure total reform of the present *Divorce Act*. The Act should protect children's extended family relations, specifically with their grandparents.
- To examine legislation enacted in other provinces.
- To continue to provide effective public and government support for reforming Canadian family law, consistent with the recommendation set forth in the report of the Special Joint Committee on Child Custody and Access, *For the Sake of the Children*.[12]

On Thursday, 31 March 2005, the Grandparents Rights for Nova Scotia Association appeared before the Nova Scotia House of Assembly Standing Committee on Community Services. It is clear from their presentation that the objective of the Grandparents Rights Association is to have a right of access expressly provided to grandparents by legislation which can only be displaced when such access would be harmful to the child.

The Grandparents Rights Association was represented by its Chairman, Acting Vice Chairman, Secretary/Treasurer, and two members. The Chair of the Association, Mrs. Pauline Glenn, stated at the outset that:

> *We're asking this committee to work with us, speak for us, to have legislation passed in Nova Scotia giving grandchildren and grandparents access to each other, as the provinces of British Columbia, Quebec, Alberta, New Brunswick and the Yukon have done without any changes to the Divorce Act.*
>
> *First and foremost, our Association believes in what is in the best interest of the child. We wish to make this perfectly clear. We do believe that it is in the best interest of the child to continue his or her relationship with*

11 "Grandparents Rights for Nova Scotia" [unpublished informational pamphlet].

12 *Ibid.*

> *their grandparents after divorce, separation or death, unless there is concrete evidence not to do so. Our Association is asking for visitation, access to grandchildren after divorce, separation or death has taken place, to send cards, telephone them, go to see their sports, send gifts, take them out to lunch or to their grandparents' for lunch. We are not asking to adopt or have custody, although there are some grandparents who wish to do so. Grandparents with whom a child has a close, or could have a close, relationship can make an important contribution to the child's growth and development. Where it is the best interest of the child, it's important to preserve those relationships.* [13]

Following Mrs. Glenn's presentation on behalf of the Association, the Chair of the Standing Committee inquired:

> *. . . I just want to clarify, I think you have raised three issues and I just want to be sure, are these what you're considering as grandparents' rights: you talked about access to grandchildren; you've talked about safety of children, in terms of who the custodial parent is living with; and you also talked about the option for grandparents to be considered for custody if the child is going to be removed from the family by Community Services. So those are three of the rights that you're looking at?* Mrs. Glenn: *Yes.* [14]

In response to a question from a committee member as to whether the Association was aiming to change legislation at the federal or provincial level or both, Mrs. Glenn confirmed that it was at the provincial level.

Later, in response to a question from another committee member inquiring whether the Association was *"... looking for access legislation for grandparents in the Province of Nova Scotia,"* Mrs. Glenn stated: *"Or if you want to change that around, we would be flexible to say rights of the children to have access to their grandparents, if you wish to put it that way."* [15]

Before adjourning, the Standing Committee passed a motion, which was shortly thereafter forwarded by Ms. Marilyn More, Chair of the Standing Committee on Community Services, to the attention of the Minister of Community Services and the Minister of Justice.

---

13 Nova Scotia, House of Assembly, Committee on Community Services, Hansard (31 March 2005) at 2.

14 *Ibid.* at 5.

15 *Ibid.* at 21.

The motion read as follows:

> *[T]hat the Standing Committee on Community Services ask the Minister of Community Services and the Minister of Justice to review the legislation of BC, Alberta, New Brunswick, the Yukon and Quebec . . . as it pertains to the rights of grandparents, and report back to the Standing Committee as to the possible action in Nova Scotia legislation and to report back to the Committee within a six month period.* [16]

In early October 2005, the Minister of Justice and the Minister of Community Services reported back to the Chair of the Standing Committee on Community Services with respect to the subject of the motion. The Ministers also advised that discussions were then underway with the Law Reform Commission regarding a potential project on this issue. [17]

In November 2005, the Chair of the Standing Committee on Community Services wrote to the Commission, enclosing a transcript from the Committee's meeting with the Grandparents Rights for Nova Scotia Association, along with other helpful materials. The Chair encouraged the Commission to undertake this project. [18]

As noted above, the Law Reform Committee received a formal request from the Minister of Justice in January 2006 and commenced work on this project shortly thereafter.

Following preliminary research, the Commission established a project Advisory Group consisting of judges, lawyers, and family psychologists/therapists experienced with the issues raised by this project. The Commission is grateful for the advice it has received from the Advisory Group. The Commission also acknowledges with appreciation the correspondence and materials it has received from the Chair of the Grandparents Rights for Nova Scotia Association.

In January 2007, the Commission published a Discussion Paper, copies of which were widely distributed to members of the House of Assembly, practising lawyers, judges, interested associations and individuals, and members of the public. The Discussion Paper was also posted on the Commission's website, and comments were invited with respect to the issues raised in the Discussion Paper. The Discussion Paper received considerable media attention, in print, on radio, and on the Internet.

---

16 *Ibid.* at 28.

17 Letter, Michael G. Baker, Q.C. & David M. Morse to Marilyn More, 3 October 2005.

18 Letter, Marilyn More to John E.S. Briggs, 24 November 2005.

The Commission acknowledges with appreciation all of the submissions which it has received. Having taken into account the comments received, and where appropriate, having completed additional research, the Commission has prepared this Final Report.

III) THE LEGAL LANDSCAPE

At present the relevant legislation in all Canadian jurisdictions makes it possible for grandparents to apply for custody of, or access to, their grandchildren. There is no jurisdiction in Canada, however, which provides to grandparents automatic access as of right - usually referred to as a "presumptive right of access."

A great deal of misinformation and confusion seems to prevail about this aspect of the law in Nova Scotia. The Commission wishes to make one point absolutely clear. It is incorrect to suggest that grandparents have no means to seek access to their grandchildren, in the event of a dispute over access with a custodial parent or guardian. Like other persons interested in a child's well-being, grandparents are entitled to seek the assistance of the courts to obtain access. What grandparents in Nova Scotia do not possess is an automatic right of access, enforceable regardless of the wishes of a custodial parent, guardian, or grandchild.

Constitutional responsibility for family law matters in Canada is divided between the federal and provincial governments. The *Constitution Act, 1867* [19] at s.91(26) provides the federal government with responsibility over "marriage and divorce" and the provinces with jurisdiction over "solemnization of marriage," as well as responsibility for matrimonial property law, by virtue of ss. 92(12) and (13) respectively. Jurisdiction for matters such as support, child custody and access is shared by both the provincial and federal governments.[20] In the case of a conflict, however, an order under federal legislation is supposed to prevail further to the theory of federal paramountcy.[21]

---

19 (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5.

20 See for example Peter W. Hogg, *Constitutional Law of Canada*, Fifth edition supplemented, Vol. 1 (Scarborough, Ont.: Thomson Canada Ltd., 2006) at paras. 27.5, 27.8(a).

21 *Ibid.* at paras. 27.8(a), 16.1.

1) Federal Legislation

Divorce proceedings in Canada are governed by the federal *Divorce Act*.[22] Section 16 of the *Divorce Act* addresses the issues of custody and access, and provides that an application for custody or access may be made *"by either or both spouses or by any other person."* Section 16(3) provides, however, that an application by a person other than a spouse may not be made *"without leave of the court"*.

Section 16(8) of the *Divorce Act* directs the court that in making an order for custody or access it *"shall only take into consideration the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child."*

It is to be emphasized that the federal *Divorce Act* only applies to custody and access applications presented in the context of divorce proceedings following marriage. The *Divorce Act* does not apply to common law relationships or other situations such as separation and death, which are governed by provincial legislation.

2) Provincial and Territorial Legislation

Although historically, grandparents had no automatic right of access to their grandchildren, now all provinces and territories permit grandparents to bring applications for access to their grandchildren. The legislative language of provincial jurisdictions of particular interest is canvassed below.

a) Nova Scotia - Section 18(2) of the *Maintenance and Custody Act*[23] provides that a parent or guardian or *"other person with leave of the court"* may apply for custody of, or access to, a child.[24] Although there is no explicit reference to grandparents, this provision has been used by them to obtain access to their grandchildren.[25]

---

22 R.S.C. 1985 (2nd supp.), c.3.

23 R.S.N.S. 1989, c. 160.

24 For examples of reported decisions providing grandparents with court-ordered access, see *White* v. *Matthews*, [1997] N.S.J. No. 604 (N.S. Fam. Ct.) (QL) and *Salter* v. *Borden* (1991), 101 N.S.R. (2d) 171 (Fam. Ct.).

25 Numerous reported decisions involve leave applications. Leave was granted in, for example, *Manuel* v. *Hughes* (2005), 20 R.F.L. (6th) 313 (N.S. Fam. Ct.) (but only in relation to one of the applications in issue), *M.B.* v. *C.W.* (1997), 31 R.F.L. (4th) 351 (N.S. Fam. Ct.), and *Lewis* v. *Wells* (1993), 125 N.S.R. (2d) 76 (Fam. Ct.). Applications for leave were unsuccessful in, for instance, *Manuel*, *ibid.* (one of the two applications decided in the case), *B.D.* v. *S.D.*, [1995] N.S.J. No. 472 (N.S. Fam. Ct.) (QL), and *Daley* v. *Daley* (1992), 124 N.S.R. (2d) 273 (Fam. Ct.).

It is to be noted that the Nova Scotia legislation mirrors the language of the equivalent provision in the federal *Divorce Act*. Also, only the federal *Divorce Act* and the Nova Scotia legislation require leave of the court before an application may be presented on behalf of the grandparent.

Legislation in Newfoundland, New Brunswick, Quebec, Alberta, British Columbia, the Yukon and Manitoba makes explicit reference to grandparents.

b) **Newfoundland** - Section 27 of the *Children's Law Act*[26] provides that a parent of a child or *"other party as specified in s.69(4)(b)-(d), may apply to the court for an order for custody or access."* Section 69(4) of the Act expressly provides that "other party" includes a grandparent of the child.

c) **New Brunswick** - Under Section 129(3) of the *Family Services Act*, [27] upon application, the court may order that any person shall have access to a child. The Act mandates that determination of access must be made in the best interests of the child and section 1 of the Act defines the best interests of the child in such a way as to require taking into consideration *"love, affection and ties that exist between the child and . . . where appropriate . . . each grandparent of the child."*

d) **Quebec** - Under Article 605 of the Civil Code of Quebec,[28] either a parent or a third person may apply for custody or access to a child. Article 611 of the Civil Code provides that: *"In no case may the father or mother, without grave reason, interfere with personal relations between the child and his grandparents. Failing agreement between the parties, the terms and conditions of these relations are decided by the court."*

e) **Alberta** - The *Provincial Court Act*[29] was amended in 1997 to make specific provision for a grandparent access application. Section 32.1(2) of the Act provides as follows: *"If a grandparent at any time is refused access to a child, the court may on application make an order as it sees fit regarding the grandparent's right of access to the child."*

---

26 R.S.N.L. 1990, c. C-13.

27 S.N.B. 1980, c. F-2.2.

28 S.Q. 1991, c. 64.

29 R.S.A. 2000, c. P-31.

f) **British Columbia** - Under section 35(1) of the *Family Relations Act*,[30] the *"court may on application order that one or more persons may exercise custody over a child or have access to the child."* Subsection (1.1) provides: *"The reference to 'persons' in subsection (1) includes parents, grandparents, other relatives of the child and persons who are not relatives of the child."* Section 24(1) of the legislation mandates that the best interests of the child are paramount when making custody and access orders, and specifically directs a court to consider *"the love, affection and similar ties that exist between the child and other persons"* which class are defined to *"include parents, grandparents, other relatives of the child and persons who are not relatives of the child."*

g) **Yukon** - Section 33(1) of the *Children's Act*[31] provides that *"a parent of the child, or any other person, including the grandparents, may apply"* for a custody or access order. Section 30(1) of the Act mandates that in determining the best interests of the child with respect to a custody or access application, the court must consider, amongst other things, *"the bonding, love, affection and emotional ties between the child and*

i) each person entitled to or claiming custody of or access to the child;
ii) other members of the child's family who reside with the child; and
iii) persons, including grandparents, involved in the care and upbringing of the child."

h) **Manitoba** - Section 78(1.1) of the *Child and Family Services Act*[32] provides that "a grandparent, step-parent or other member of a child's family who does not have a right to apply for access to the child under any other provision of this Act or under a provision of another Act may apply to court for access to the child."

Section 78(4.2) of the Act directs the court when determining the best interests of the child to consider additionally "all relevant matters, including a) the mental, emotional and physical needs of the child; b) the nature of any pre-existing relationship between the applicant and the child; and c) where the application is made by a grandparent, that a child can benefit from a positive, nurturing relationship with a grandparent."

The legislative language employed by other provinces, while containing no express language dealing with grandparent access, is cast widely enough so as to allow for access applications on the part of grandparents, such as is the case in Nova Scotia and under the provisions of the federal *Divorce Act*.

---

30 R.S.B.C. 1996, c. 128.

31 R.S.Y. 2002, c. 31.

32 C.C.S.M. c. C80, as amended by S.M. 2006, c.30. **Note:** The Manitoba legislation came into force in December 2006, after the Commission's Discussion Paper had been finalized for printing.

3) How the Courts Have Responded

a) Two Main Approaches

An examination of case law indicates that applications for access are brought by grandparents in a variety of contexts. Courts have addressed applications in the course of divorce and separation proceedings, as well as those involving intact families where both parents oppose the access sought by grandparents. In addition, courts have dealt with situations involving single parent families with and without an involved non-custodial parent.

Broadly speaking, the cases appear to reflect two quite different approaches on the part of the courts, with significantly different implications, to the issue of grandparent access.

The first approach, which has been characterized by some legal commentators as the "Parental Autonomy" approach, is based on the premise that parents have the legal responsibility and the right to make decisions with respect to with whom their child will associate, how often, and in what circumstances. Parents are traditionally, and continue legally, to be the arbiters of their child's "best interests". In the absence of a finding of parental unfitness, or harm flowing from lack of access, the state has no right to interfere with parents' proper decision making authority.

The second approach has been called the "Pro Contact" approach and tends to proceed from the premise that generally, contact between a child and their grandparent is beneficial, and therefore access should not be denied unless it can be shown to be harmful. The legislation in some jurisdictions, as noted above, requires a court to expressly consider the quality of the grandparent-grandchild relationship as a factor in determining the best interests of the child when making a custody or access order.

Although an examination of case law can be instructive, it is difficult to generalize about what the cases say, particularly in an area of law where decisions are so fact sensitive. The common thread connecting grandparent access cases is, however, the courts' adherence to the "best interests of the child test" in weighing the relevant facts and deciding whether to grant or deny access.

b) Canadian Case Law

i) Ontario

In 2001, the Ontario Court of Appeal heard the case of *Chapman* v. *Chapman*, [33] which involved an intact family in which both parents opposed the paternal grandmother's application for access to grandchildren.

The Ontario Court of Appeal's decision in *Chapman* has often been cited as representing one of the strongest judicial expressions of support for the parental autonomy approach. Justice Abella, writing for the court, in finding on behalf of the parents, stated as follows:

> *17* *The essence of the grandmother's submission is that, in general, it is in the best interests of children to maintain contact with members of their extended family. The test, however, is not what, in theory, is best for children in general, but what is in the best interests of the particular children before the court.*
>
> *18* *In the particular circumstances of this case, the children are being forced to travel some distance on a regular basis to visit a grandparent with whom they do not, at the moment, have a positive relationship. It is difficult to see how this disruptive situation could be said to be in the best interests of the children.*
>
> *19* *A relationship with a grandparent can - and ideally should - enhance the emotional well being of a child. Loving and nurturing relationships with members of the extended family can be important for children. When those positive relationships are imperiled arbitrarily, as can happen, for example, in the reorganization of a family following the separation of the parents, the court may intervene to protect the continuation of the benefit of the relationship.*
>
> *20* *In this case, however, the issue is not about preserving a positive relationship, but about whether the disruption and stress generated by the grandmother's insistent attempts to get access on her own terms are in the children's best interests.*
>
> *21* *The trial judge acknowledged that the right of Larry and Monica Chapman 'to independently raise their children should not be lightly interfered with,' yet he defers that right to the speculative hope that continued imposed access to the grandmother will one day produce a positive relationship with these children. This speculation, it seems to me, is an insufficient basis for overriding the parents' right to protect the children's interests and determine how their needs are best met. These are loving, devoted parents committed to their children's welfare. In the absence of any evidence that the parents are behaving in a way which demonstrates an inability to act in accordance with the best interests of their children, their right to make decisions and judgments on their children's behalf should be respected, including decisions about whom they see, how often, and under what circumstances they see*

[33] (2001), 201 D.L.R. (4th) 443 (Ont. C.A.).

them.

22 *Larry and Monica Chapman, not Esther Chapman, are responsible for the welfare of the children. They alone have this legal duty. Esther Chapman, as a grandparent, loves her grandchildren and, understandably, wants to maintain contact with them. Nonetheless, the right to decide the extent and nature of the contact is not hers, and neither she nor a court should be permitted to impose their perception of the children's best interests in circumstances such as these where the parents are so demonstratively attentive to the needs of their children. The parents have, for the moment, decided that those needs do not include lengthy, frequent visits with their grandmother. Although the parents' conflict with Esther Chapman is unfortunate, there is no evidence that this parental decision is currently detrimental to the children. It should therefore be respected by the court and the children's best interests left in the exclusive care of their parents.*

23 *The trial judge's articulated purpose was to create a close relationship between two children and a grandmother who loves them. There can be no criticism of this goal. But any duty to create such a relationship lies with the children's parents. The failure to do so does not warrant judicial intervention, especially in circumstances such as these where the immediate family is functioning well and the children's best interests are being assiduously nurtured by dedicated parents.* [34]

Notwithstanding the characterization of *Chapman* as one of the strongest judicial expressions of support for the parental autonomy approach, a careful reading of the decision would suggest that it in fact reflects a considered balancing of the issues and interests at play. Justice Abella clearly states that the determinative test is *"what is in the best interests of the particular children before the court."* [35] Justice Abella not only recognizes the potential importance and benefit of a grandparent-grandchild relationship, but clearly states that:

> *When those positive relationships are imperiled arbitrarily as can happen for example in the reorganization of a family following the separation of the parents, the court may intervene to protect the continuation of the benefit of the relationship.* [36]

In the particular facts before the court, Justice Abella found no existing positive relationship. In light of that finding, Justice Abella found that *"there is no evidence that this parental decision is currently detrimental to the children."* The decision does clearly indicate that *"In the absence of any evidence that the parents are behaving in a way which demonstrates an inability to act in accordance with the best interests of their children, the right to make decisions and judgments on their children's behalf should be*

34 *Ibid.* at 448-450.

35 *Ibid.* at 448.

36 *Ibid.* at 449.

respected, including decisions about whom they see, how often, and under what circumstances they see them."[37]

It would be entirely inaccurate, however, to characterize the Court of Appeal's decision as reflecting unqualified support for parental autonomy.

ii) Nova Scotia

In the Nova Scotia case of *Salter* v. *Borden*[38] the judge's decision reflects the inherent tension between the parental autonomy and pro contact approaches noted above. Judge Sparks stated:

> *Traditionally, any access to grandparents has flowed from the parent. It is best that parents make these decisions as the law clearly recognizes the parental right to control the upbringing of their children. Rarely, will the state interfere with the moral and legal parental obligation to determine the best course in life for their children. Reasonable parents, however, in determining, what is best for their children, can readily identify the multiple benefits which can be bestowed upon children by spending time with grandparents. Knowledge of bloodline and an expanded family support base for love, affection and understanding are but two such benefits. Similarly, if the grandparents are undermining the parental authority, creating conflict or physically exposing the child to danger, then a reasonable parent would deny or curtail access in the best interest of the child.*
>
> . . . . . .
>
> *. . . more frequently it is becoming common for children denied the right to know their biological ancestry, to embark on such searches in an attempt to complete their identity. Should the court then thwart or deny such a potentially valuable relationship considering the long term implications for secure identity development?*
>
> *Apart from the above concern, an attempt should be made to examine the reasonableness of the parent in denying access. . . . . Unfortunately, the mother in my view is unreasonable and immature . . . .*
>
> *I deliberately examined the reason advanced by the mother in support of a denial of access. This was done so as to illustrate the lack of judgment and prudency in dealing with her own affairs and inability to properly understand and assess, independently, the best interest of her son.*[39]

---

37 *Ibid.* at 449.

38 *Supra* note 24.

39 *Ibid.* at 174-175.

The court awarded the grandmother limited access.

In another Nova Scotia case, *White* v. *Matthews*,[40] the court ordered a limited access in favour of paternal grandparents who were black. The child was bi-racial, and the court held that it was important for the child to have contact with the grandparents in order to provide a connection to the child's black heritage.

In the case of *Daley* v. *Daley*,[41] Judge Gass, of the Nova Scotia Family Court, denied an application for leave to apply for access by the paternal grandparents. Perhaps the determinative consideration was the fact that the grandparents already enjoyed access through their son. In reaching her decision, however, Judge Gass stated:

> *I am of the view that unless there are grave extenuating circumstances, children can benefit from the involvement of the extended family, as long as that involvement is not destructive or divisive in nature. However, I am not convinced that court ordered access is necessarily in the best interests of the child, even where access is a good thing, unless there are extenuating circumstances. If this were the case, the potential is there to have a child's entire life scheduled by court order to be with those with whom the child's interaction is considered appropriate and important.* [42]

A 2005 Nova Scotia case of interest is that of *Manuel* v. *Hughes*, [43] which involved applications for leave to apply for access on the part of both maternal and paternal grandmothers. The paternal grandmother's application for leave was denied because the court found that her relationship with her grandchildren had been sporadic and troublesome to the extent of being intrusive and destructive. The court concluded that a relationship with the paternal grandmother would be detrimental to the well being of the grandchildren. The material grandmother's application for leave to apply for access was granted, however, because the court found that she had been consistently involved in the lives of the grandchildren and there was a pre-existing and positive relationship. The "best interests" test therefore led the court to grant one leave application and deny the other.

---

40 *Supra* note 24.

41 *Supra* note 25.

42 *Ibid.* at 274.

43 *Supra* note 25.

iii) Alberta

A recent Alberta case, *W.(C.)* v. *T. (O.)*,[44] dealt with an application, under the *Provincial Court Act*, of a grandparent who had been refused access to a grandchild. Judge Carruthers of the Alberta Provincial Court stated that:

> *The effect of the legislative provision enables the Court to examine the underlying reasons for the denial of access and to make a determination as to the reasonableness of the actions of the parents.*
>
> *In my view, the Court should not lightly interfere with the parental right unless the Applicants demonstrate the patent unreasonableness of the parents' action and further that an intrusion on that right would be in the best interests of the children. In other words, parental authority is not absolute but subject to consideration by the Court in light of a reasonableness test.* [45]

He went on to find that:

> *I cannot find that the actions of the parents are unreasonable . . . Therefore, notwithstanding my view that the lives of the children may be diminished by lack of contact with obviously doting grandparents, the balance in this case does not lead me to conclude that the decision of the parents to withdraw access is so patently unreasonable that a Court is justified in overturning it. Parental decision making should be interfered with in only the clearest of cases, and this is not one of them.* [46]

iv) British Columbia

In a different, and earlier, *Chapman* case, Justice Brenner of the British Columbia Supreme Court set forth three principles applicable to an access determination as follows:

> *In determining the best interests of an infant, such as the four year old child in this case, the Court must also be mindful of the following:*
> *i) The onus is on the applicant to demonstrate that the proposed access is in the child's best interests.*
> *ii) The custodial parent has a significant role. The courts should be reluctant to interfere with a custodial parent's decision and should do so only if satisfied that it is in the child's best interests.*

44 (2004) 4 R.F.L. (6th) 239 (Alta. Prov. Ct.).

45 *Ibid.* at 242.

46 *Ibid.* at 243.

iii) *It is not in the best interests of a child to be placed in circumstances of real conflict between the custodial parent and a non-parent. While the court must be vigilant to prevent custodial parents from alleging imagined or hypothetical conflicts as a basis for denying access to non-parents, in cases of real conflict and hostility, the child's best interests will rarely, if ever, be well served by granting access.* [47]

v) Quebec

Article 611 of the *Civil Code of Quebec* establishes a presumption in favour of the continuation of links between grandparents and grandchildren. The *Code* explicitly provides that parents can only interfere with such personal relations in the event of a "grave reason."

The historical genesis of Article 611 is of some interest. It first came into effect in 1981 as Article 659, which in turn can trace its origins to a provision from the French Civil Code. In 1981, at the time of its introduction, grandparents could be held responsible to maintain their grandchildren. An argument used to justify the introduction of Article 659 was that in light of the potential legal obligation of grandparents to provide financial support to their grandchildren, it was only fair to help guarantee personal relations linking them to their grandchildren. The obligation of grandparents to provide financial support to their grandchildren was eliminated from Quebec law in 1996. [48]

Notwithstanding the presumption in favour of the continuation of links between grandparents and grandchildren, as one commentator has pointed out, one must not confuse the terms "personal relations between the child and his grandparents" at Article 611 with a right of access, even if grandparents will often give expression to those personal relations by means of having physical access to the grandchildren. [49]

47 *Chapman* v. *Chapman*, 1993 Carswell BC 1522 at para. 24 (B.C.S.C.) (Westlaw-eCarswell).

48 Dominique Goubau, "Relations Grand-Parents et Petits-Enfants: Le Juste Equilibre Entre L'intérêt Légitime et L'intrusion" in *Developpements Récents en Droit Familial* (Cowansville: Editions Yvon Blais, 2001) 67 at 75-76; Civil Code of Lower Canada, arts. 166, 168.

49 Goubau, *ibid.* at 69.

An examination of Quebec case law indicates that any application under Article 611 is to be assessed and decided on the basis of the child's best interests. [50]

Poor relations between the grandparents and parents with the resulting tension and conflict, will not in itself serve as a "grave reason" under Article 611, so as to justify an end to contact between grandparents and grandchildren. The critical point is not the presence of conflict, but rather its impact, whether actual or potential, on a child.[51]

Cautionary Observations

One legal commentator, Professor Martha Shaffer, after carefully reviewing the Canadian courts' handling of access cases has concluded with the following cautionary observations:

> *Courts have struggled with conflicting background principles to adopt a cautious pro-contact approach to grandparent access claims. In general terms, this approach appears to strike a good balance between protecting parental decision making on the one hand, and safeguarding relationships that are important to the child on the other. Courts do not order access based simply on the fact that the applicant is a grandparent. Instead, courts make a serious attempt to determine on the facts of the case whether the child will truly benefit from the grandparent's presence in his or her life.*
>
> . . . . .
>
> *So long as courts do not use their power to order grandparent access too liberally, a careful pro-contact approach holds out the best promise for fostering the child's best interests in grandparent access disputes.*
>
> *If there is one lesson to be learned from canvassing the case law on grandparent access, it is that in many of the cases that go to court, grandparent access is not in the children's best interests. All too often, parents have extremely good reasons for denying access and have reached their decisions after considerable deliberation. Many grandparents do not live up to the idealized image of the sage and caring grandparent and instead threaten to cause more harm than good if contact is granted.*
>
> *This lesson is important for both courts and legislatures. It suggests that courts ought to continue to tread*

50 See for example *T.(J.)* v. *P.(L.)*, 2006 Carswell Que 882 at paras. 15-16 (Que. Sup. Ct.); *S.(R.)* v. *N.(B.)*, 2005 Carswell Que 10, 716 at para. 23 (Que. Sup. Ct.); *B.(S.)* v. *Bo.(J.)*, 2006 Carswell Que 877 at para. 14 (Que. Sup. Ct.) (Westlaw eCarswell).

51 Goubau, *supra* note 48 at 79-80.

> *carefully when faced with grandparent access claims. Before ordering access, courts should be rigorous to ensure that the assumption that it is in children's best interests to have contact with their grandparents applies on the facts of the case.* [52]

In considering Canadian judicial approaches to grandparent access, it may be instructive to note some recent American experience.

c) American Case Law

In 2000, shortly before the Ontario Court of Appeal's decision in *Chapman*, the United States Supreme Court in the case of *Troxel* v. *Granville* [53] confirmed a Washington Supreme Court decision which had found that state legislation permitting grandparent access unconstitutionally infringed on the fundamental rights of parents to rear their children. Justice Sandra Day O'Connor writing for the majority indicated that the impugned legislation violated the Fourteenth Amendment of the United States Constitution which *"provides heightened protection against governmental interference with certain fundamental rights and liberty interests."* [54] She stated that the liberty interest at issue, namely custody and control of children, *"is perhaps the oldest of the fundamental liberty interests recognized by this court."* [55]

Justice O'Connor concluded that:

> *[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.* [56]

The court noted that there is a presumption that fit parents act in the best interests of their children.

---

52 Martha Shaffer, "To Grandmother's House We Go? An Examination of Grandparent Access," (2003-2004) 21 C.F.L.Q. 437 at 499-500.

53 120 S.Ct. 2054 (2000).

54 Quoting from another U.S. Supreme Court decision, *ibid.* at 2060.

55 *Ibid.*

56 *Ibid.*

Justice O'Connor continued:

> *[S]o long as a parent adequately cares for his or her children (i.e. is fit) there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.* [57]

Justice O'Connor further stated:

> *In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an inter-generational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.* [58]

57 *Ibid.* at 2061.

58 *Ibid.* at 2062.

IV) DISCUSSION OF ISSUES

The Law Reform Commission has been asked to consider the matter of grandparents' access rights, and what, if any, recommendations ought to be put forth to reform Nova Scotia law.

It is to be noted that the term "grandparent" has a much more expanded connotation than was the case only decades ago. The frequency today of both divorce and common law relationships, as well as more recently the emergence of same-sex relationships, has expanded significantly the number of potential grandparent figures in a child's life. In such circumstances, the scheduling of access can be more than a little challenging for a custodial parent.

Family law issues, particularly as they relate to custody of, and access to, children, are especially difficult ones. This is no less so than when dealing with the issue of access by grandparents to their grandchildren. As noted earlier in this paper, grandparents do not always live up to the idealized image of a wise and loving individual. Many grandparents are unquestionably a very beneficial influence in the lives of their grandchildren, providing love, care and support. Sadly, however, in some cases they cause more harm than good. It is clear from an examination of case law in Nova Scotia and elsewhere that sometimes there are very good reasons, in particular circumstances, for parents denying or limiting the access of grandparents to grandchildren.[59]

Fortunately, in most cases, arrangements relating to the custody and access of children, including access by grandparents and others, are settled without recourse to litigation and the courts.[60] The cases that do come before the courts, therefore, represent a very small percentage of the overall number of potential family law disputes. Furthermore, it would appear, for example, that during the past six years there were only four reported cases in Nova Scotia which involved decisions on grandparents' applications for access.[61] Although not all court cases are reported, the Commission is not aware of any unreported case which bears on the subject of this report.

---

59 See, for example, the decisions in *D(WA)* v. *S(DL)*, 2005 ABPC 319 (Alta. Prov. Ct.), *M(W)* v. *B(J)*, 2001 ABPC 100 *(Alta. Prov. Ct.)*, and *S(MD)* v. *M(SA)* (1999), 182 N.S.R. (2d) 337 (Fam. Ct.).

60 Indeed, in Nova Scotia potential litigants are actively encouraged to fully utilize the conciliation and mediation services provided by the Family Court. See online "Courts of Nova Scotia" website, "Family Services" link, www.courts.ns.ca/supreme/sc_services.

61 Those decisions are *Manuel* v. *Hughes*, *supra* note 25, *Marginson* v. *Deveau*, 2004 NSCA 199, *Y(L)* v. *F(BJ)*, 2004 NSSF 22, and *A(DD)* v. *W(M)*, 2003 NSFC 5. In *B(S)* v. *A(L)* (2001), 192 N.S.R. (2d) 93 (N.S. Fam. Ct.), it had not been necessary to decide on the paternal grandparents' access application, as they had indicated to the court their willingness to exercise access through the father.

Historically, grandparents had no legal rights of access to their grandchildren simply by virtue of their biological relationship. In all jurisdictions in Canada today, however, grandparents may make an application to the court to obtain an order providing them with access to a grandchild. In Nova Scotia, a grandparent must first obtain the leave or permission of the court in order to bring an application. Such leave, although sometimes denied, has been granted by the Nova Scotia courts in appropriate circumstances.

The legislative provisions in all jurisdictions in Canada mandate that courts, when deciding upon an access application, must do so on the basis of the child's "best interests." These interests are to be paramount in reaching any decision.

The challenge raised by the issue referred to the Commission invites a number of questions. Should Nova Scotia law be changed so as to provide an automatic right of access in favour of grandparents? This question necessarily raises two further and related questions, namely: What would be the principled basis for distinguishing between grandparents and other close relatives such as aunts, uncles, or siblings? Also, what would be the principled basis for displacing or diminishing a parent's right to decide who will or who will not have access to their children, and the conditions of any such access?

The Special Joint Committee on Child Custody and Access addressed the first of these two related questions, and concluded as follows:

> *The Committee found the testimony of grandparents and their representatives extremely compelling. The Committee also heard moving testimony, however, about the importance of siblings, step-siblings and other extended family members in the lives of children. Other important people in the life of a child might well be family members or friends, and many members of the Committee felt there should be no legislative presumption that grandparents have a different standing in parenting applications relative to those other important people.* [62]

Similarly, the Commission's Advisory Group was unanimous in their view that there is no justification for differentiating between grandparents and other important people in the life of the child. While grandparents have a unique relationship to grandchildren, the quality and significance of that relationship may not, in fact, be as important as the grandchild's relations with other family members. Having taken into account the views of the Special Joint Committee and of the Advisory Group, the Commission does not believe that in considering the issue of a legislative presumption, there is any principled basis for differentiating between grandparents and other important family members.

---

62 *For the Sake of the Children*, *supra* note 2 at 56.

The related question of what would be the principled basis for diminishing a parent's right to decide who will have access to their child necessarily arises in the context of considering an automatic right of access in favour of grandparents. The custody and control of one's children is a fundamental liberty interest and the protection of parental autonomy from unnecessary interference is an important Canadian value. These are elements which are essential to the security and integrity of the family unit, and consequently, closely connected to the best interests of the child.

At present, Canadian parents are legally obliged and have the necessary authority to make decisions regarding the care and upbringing of their children. This includes decisions regarding with whom their children will associate and the circumstances of such contact. The review of parental decision making authority by a court and the substitution of its own decision for that of a parent is only justified in the most compelling of circumstances. Such circumstances arise where, for example, there is clear evidence that a parent is unfit and incapable of making decisions in the best interests of their child, or where a parent's decision will cause actual or likely harm to the child.

Some legal scholars have suggested that the *Charter of Rights and Freedoms* [63] provides constitutional protection for parental decision making. Professor Nicholas Bala has argued, for example, that:

> *[T]here is a strong argument that a grandparent's request for access is an application for state interference in the family sphere, that there should ordinarily be a strong presumption that a parent, rather than a judge, will make decisions about their children. In the absence of the grandparent having assumed the role of a psychological parent, it is in the long term best interests of both parents and children to avoid having judges making decisions about the extent to which children will see their grandparents. Judicial interference in this type of decision making can be viewed as a state threat to the constitutionally protected "security of the person" of both children and parents, which can only be justified if it is in demonstratively in the best interests of the children.* [64]

A review of the case law indicates that in many cases where parents have denied access to a grandparent, the courts have agreed with that decision. There are also, however, a number of cases where grandparents have had recourse to the courts and successfully obtained access to their grandchildren. In Nova Scotia, under existing law, the applicant grandparent must seek the leave of the court to bring an application and, if successful at the leave stage, must persuade the court that the child's best interests dictate grandparent access, notwithstanding the objection of the parent. It is the grandparent who must persuade the court that there is legal justification for overturning the

---

63 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

64 Nicholas Bala, "The Charter of Rights and Family Law in Canada: A New Era" (2000-2001) 18 C.F.L.Q. 374 at 427.

parent's decision. An automatic right of access in favour of a grandparent would put the objecting parent on the defensive and require them to present a case to show why access should not be granted.

The Commission does not believe there is a compelling reason for shifting the burden of proof in respect of an access application brought by a grandparent or relatives.

At present, there is no presumptive or automatic right of access in favour of grandparents in Nova Scotia or any of the other jurisdictions in Canada. While Quebec provides a presumption in favour of the continuation of pre-existing links, a careful examination of the case law indicates that Quebec courts will only order access against the wishes of a custodial parent when they have made a finding that it is in the best interests of the grandchild.[65]

There is no question that in some cases continuation of an existing grandparent-grandchild relationship is in the best interests of the child. Similarly, relations between a child and other family members, such as aunts, uncles, siblings, step-parents, step-grandparents and step-siblings and other persons of significance, can be and often are tremendously beneficial to the child's health, welfare and development. There are also situations where such relationships are not in the best interests of children.

As Professor Shaffer noted following her extensive canvass of case law on grandparent access:

> *The lesson for legislatures is to be wary of adopting a formal presumption in favour of grandparent access. Grandparent access is not in the children's best interests in many cases. Enacting a legislative presumption in favour of grandparent access may be read as a signal that courts should grant access more frequently and carries the risk that access will be granted in cases where it is not in children's best interests. Finally, the case law suggests that courts have crafted a balanced approach using the best interest of the child test and that legislative reform is not needed.* [66]

The Senate House of Commons Special Joint Committee on Child Custody and Access was not in favour of automatic rights of access in relation to parents after divorce. [67] Rather, the Joint Committee recommended those arrangements should be decided on the basis of the "best interests of the child." The Commission is of the view that the "best interests of the child" require each case

---

65 As examples, see *T(J)* v. *P(L)*, 2006 CarswellQue 882 (Que. Sup. Ct.), *S(R)* v. *N(B)*, 2005 CarswellQue 10716 (Que. Sup. Ct.), and *B(S)* v. *Bo(J)*, 2006 CarswellQue 877 (Que. Sup. Ct.).

66 Shaffer, *supra* note 52 at 500.

67 *For the Sake of the Children*, *supra* note 2 at 41-45.

to be assessed on the basis of its own merits as determined by careful consideration of the particular facts presented by the case. A case by case approach to an assessment of the best interests of a child is not compatible with an automatic right of access. Such a right, in effect, prejudges what is in the best interests of the child and, as decided cases indicate, sometimes such access may not correspond to what is in fact in the child's best interests. It is the Commission's view that the best interests of the child therefore is incompatible with such a presumptive or automatic right of access.

The Law Reform Commission's Advisory Group was unanimously against a recommendation that the law be changed so as to provide a presumptive right of access in favour of grandparents in Nova Scotia. The Commission does not believe that there is a compelling reason for providing any extended family members with an automatic right of access.

V) RECOMMENDATIONS FOR REFORM

i) Best Interests Factors

The best interests of the child test is the legal standard by which access applications are to be decided. It is the Commission's conclusion that existing Nova Scotian legislation, when viewed through the lens of the best interests of the child, strikes the right balance. The best interests of the child test, however, has been criticized at times for being too imprecise. The Commission's Advisory Group was of the view that more detailed legislative guidelines could be very helpful in making access determinations.

More specifically, the Advisory Group suggested that the *Maintenance and Custody Act* could be amended to include a list of criteria in determining the best interests of the child in the context of access applications. Reference was made by the Advisory Group to the *Children and Family Services Act*,[68] which identifies factors to be used in defining "best interests" in a number of situations. The most comprehensive list of such factors is found in the Interpretation Section at s.3(2), which reads as follows:

> *(2) Where a person is directed pursuant to this Act, except in respect of a proposed adoption, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:*
>
> *(a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family;*
>
> *(b) the child's relationships with relatives;*
>
> *(c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;*
>
> *(d) the bonding that exists between the child and the child's parent or guardian;*
>
> *(e) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;*
>
> *(f) the child's physical, mental and emotional level of development;*
>
> *(g) the child's cultural, racial and linguistic heritage;*
>
> *(h) the religious faith, if any, in which the child is being raised;*

[68] S.N.S. 1990, c.5.

(i) the merits of a plan for the child's care proposed by an agency, including a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian;

(j) the child's views and wishes, if they can be reasonably ascertained;

(k) the effect on the child of delay in the disposition of the case;

(l) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian;

(m) the degree of risk, if any, that justified the finding that the child is in need of protective services;

(n) any other relevant circumstances.

The applicability and relative significance of these listed factors will vary from case to case. The existence and importance, however, of a child's relationship with a grandparent will necessarily be a critical consideration in the determination of any application for access advanced by that grandparent.

The Special Joint Committee on Child Custody and Access also considered this issue in their report, and had this to say:

> *Many witnesses emphasized the importance of the "best interests of the child" test, set out in Section 16(8) of the Divorce Act, declaring that it is the only test that is sufficiently broad, flexible and discretionary to allow courts to consider fully the individual circumstances of children and parenting disputes. However, others criticize the test as being too imprecise to give real guidance to separating parents. The concept of the best interests of the child is used widely in Canada and elsewhere, and is therefore recognized, at least to some extent. Every provincial family law in Canada refers to the welfare or the best interests of the child as the primary criteria for custody and access decisions, and the expression can be found in the statutes of many other jurisdictions, as well as several international treaties.*
>
> *A number of witnesses recommended that the Divorce Act be amended to include a list of criteria, or a definition of the best interests of the child, to guide judges and parents applying the test. Without being exhaustive, such a list would set out all matters decision makers should consider. Some children's circumstances might necessitate consideration of factors other than those listed in the legislation. The presence of a list of guiding criteria would improve the predictability of results and encourage consideration of factors considered particularly important to the well being of the child.*

> *Witnesses had a variety of suggestions about what should be included in the list of criteria for the best interests of the child. . . .*
>
> *The National Family Law Section of the Canadian Bar Association recommended that criteria similar to those set out in Ontario's Children's Law Reform Act, as amended to reflect any new terminology adopted in the federal legislation, be enumerated in the Divorce Act.* [69]

The Special Joint Committee concluded their deliberations on this issue by recommending a detailed list of criteria.

In December, 2002 the then-federal Government tabled Bill C-22 to amend the Divorce Act in part by adopting a list of factors to be considered when determining the best interests of the child. Following 2nd reading, Bill C-22 was sent to Committee in March 2003 but was never enacted. The proposed best interests criteria are very similar to those proposed by the Special Joint Committee, and are reproduced at Appendix "A".

The Commission recommends that in order to help guide judges, parents, grandparents and other interested persons, the *Maintenance and Custody Act* be amended to provide a "best interests of the child" list of factors to consider, similar to the provisions in the *Children and Family Services Act* as set out above.

ii) Explicit Recognition of Grandparents

The Commission's Advisory Group also considered whether section 18(2) of the *Maintenance and Custody Act* should be amended so as to provide explicit recognition to grandparents. While such an amendment would not change the substantive law, members of the Advisory Group thought that explicitly identifying grandparents as potential applicants could be helpful, in order to make it clear that grandparents do enjoy the legal means of obtaining access. Such an amendment would also make Nova Scotia's legislation similar to the comparable legislative provisions in Newfoundland, New Brunswick, Alberta, British Columbia, the Yukon and Manitoba.

---

69 *For the Sake of the Children*, *supra* note 2 at 43-44.

The Commission agrees that as a matter of clarity, Nova Scotian legislation should expressly acknowledge that grandparents may apply to court in order to seek access to their grandchildren. As discussed, however, earlier in this Final Report, the Commission is not in favour of distinguishing between grandparents and other important family members.

The Commission therefore recommends that section 18(2) of the *Maintenance and Custody Act* be amended so as to provide that an application for access may be made by a parent or a guardian or *"other person, including grandparents or other members of the child's family, with leave of the court."*

iii) Leave to Apply

The Commission's Advisory Group considered the issue of whether or not the existing requirement in the *Maintenance and Custody Act* to obtain the leave of the court in order to apply for access should be retained. The Advisory Group was of the opinion that the leave stage provided a useful threshold test affording an opportunity to screen cases that were frivolous on their face or otherwise unmeritorious.

In the case of *Gray* v. *Gray*, Justice Goodfellow discussed the leave requirement of section 18 of the *Maintenance and Custody Act* and stated:

> *The purpose of the legislation is to promote the welfare of the child, and the legislation specifically mandates that this is the paramount consideration. It follows that on an application for leave the person who is applying must meet a threshold test showing that the granting of leave is likely to be of benefit to the welfare of the child. This is the threshold or test that must be met by an applicant . . .*
>
> *The existence or absence of sufficient interest, existing relationship, etc., etc. are all important considerations to be taken into account in determining whether or not the threshold has been met. In some cases a particular factor will be weighed more heavily, ie if the applicant were a stranger to the child, normally the result would follow with the applicant not having an existing relationship or sufficient interest and would be hard pressed to convince a court that there is likely to be a benefit to the child.* [70]

---

70 (1995), 147 N.S.R. (2d) 369 at 375.

Judge Sparks, in deciding *Manuel* v. *Hughes*, a case discussed earlier in this Final Report, refers favourably to Justice Goodfellow's decision and also cites an earlier decision of Judge Daley's in which he summarizes the primary considerations on a leave application as follows:

> *First, the welfare of the child rule applies to both an application for leave as well as for access. Second, a prime facie case substantially connecting the best interest of the child with the applicant is necessary to be granted leave. Third, there must be strong and cogent reasons asserted before the court will question the wisdom of the custodial parent respecting contact of a child with family or non-family members. There must be substantive reason for disregarding the contrary wishes of the custodial parent. Fourth, unless there are grave extenuating circumstances, children can benefit from involvement with the extended family provided the involvement is not destructive or divisive in nature. Fifth, leave should not be granted if access can be achieved in some other manner such as through an access parent.* [71]

An applicant for access is asking the court to override a custodial parent's decision regarding what is best for his or her child. In addition to the potential interference with parental autonomy, the custodial parent also faces the cost and stress which invariably arise from contested proceedings. The consequences of litigation itself can have a negative impact upon the child. The Commission therefore believes that as case law now provides, it is incumbent upon an applicant for access to satisfy a court that the granting of leave to apply for access is likely to be of real benefit to the welfare of the child.

The Commission recommends that the leave provision in section 18(2) of the *Maintenance and Custody Act* be retained.

---

71 *Manuel* v. *Hughes*, *supra* note 25 at 321, citing D.(B.) v. *D.(S.)*, 145 N.S.R. (2d) 149 at 154.

LIST OF RECOMMENDATIONS

Recommendations for Reform

The Law Reform Commission of Nova Scotia recommends that:

1) **In order to help guide judges, parents, grandparents and other interested persons, the *Maintenance and Custody Act* be amended to provide a "best interests of the child" list of factors to consider, similar to the provisions in the *Children and Family Services Act*.**

2) **Section 18(2) of the *Maintenance and Custody Act* be amended to provide that an application for access may be made by a parent or a guardian or *"other person, including grandparents or other members of the child's family, with leave of the court."***

3) **The leave provision in section 18(2) of the *Maintenance and Custody Act* be retained.**

APPENDIX "A"

Bill C-22 - Proposed Amendments to the Divorce Act

APPENDIX "A"

[Bill C-22 - Proposed Amendments to the Divorce Act][72]

Best Interests of the Child

Factors to Consider

16.2 *(1) In making an order under section 16 ["parenting order," formerly custody] or 16.1 ["contact order," formerly access] or paragraph 17(1)(b) or (c) [order for variation, rescission, or suspension of parenting or contact order], the court shall take into consideration only the best interests of the child of the marriage.*

(2) In determining what is in the best interests of the child, the court shall consider all the needs and circumstances of the child, including

(a) the child's physical, emotional and psychological needs, including the child's need for stability, taking into account the child's age and stage of development;

(b) the benefit to the child of developing and maintaining meaningful relationships with both spouses, and each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;

(c) the history of care for the child;

(d) any family violence, including its impact on

i) the safety of the child and other family members,

ii) the child's general well-being,

iii) the ability of the person who engaged in the family violence to care for and meet the needs of the child, and

iv) the appropriateness of making an order that would require the spouses to cooperate on issues affecting the child;

(e) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including aboriginal upbringing or heritage;

---

72 **Note**: Bill C-22 was sent to Committee following second reading in March 2003 but was never enacted.

(f) the child's views and preferences, to the extent that those can be reasonably ascertained;

(g) any plans proposed for the child's care and upbringing;

(h) the nature, strength and stability of the relationship between the child and each spouse;

(i) the nature, strength and stability of the relationship between the child and each sibling, grandparent and any other significant person in the child's life;

(j) the ability of each person in respect of whom the order would apply to care for and meet the needs of the child;

(k) the ability of each person in respect of whom the order would apply to communicate and cooperate on issues affecting the child; and

(l) any court order or criminal conviction that is relevant to the safety or well-being of the child.

APPENDIX "B"

Members of the Advisory Group

APPENDIX "B"

Members of the Advisory Group

Members of the 2007 Grandparent-Grandchild: Access Advisory Group:

Judge Robert Levy -	Family Court
Judge M. Deborah Gass -	Supreme Court of Nova Scotia, Family Division
Professor D.A. Rollie Thompson -	Dalhousie University - Law School
Ms. Francine McIntyre -	Therapist
Dr. Martin Whitzman -	Therapist
Ms. Robyn Elliott -	Lawyer, Family Law
Professor William Charles, Q.C. -	Special Counsel

APPENDIX "C"

List of Individuals and Organizations that Provided Comments

APPENDIX "C"

List of Individuals and Organizations That Provided Comments

The following individuals and organizations provided comments on the ***Grandparent-Grandchild: Access*** **Discussion Paper**:

Individuals

Mr. Gordon Stoodley

Ms. Karen Oickle

Ms. Grace Marginson, Yarmouth

Mr. Gerald Cavanagh, Port Hawkesbury

Ms. Heather MacLeod, Dartmouth

Ms. Thelma Gillespie, Lower Sackville

Ms. Carolyn Myra, Halifax

Mr. & Mrs. Tony Lindley

Ms. Joanna Coady, Westville

Organizations

Ms. Pauline Glenn, Chairperson, The Grandparents Rights for Nova Scotia Association

Ms. Maria Franks, Executive Director, Legal Information Society of Nova Scotia